

SENTENCING — Rule 26.5, Presentence diagnostic evaluation and mental health examination — Revised 3/2010

After trial, but before sentencing, the trial court may order the defendant to submit to a mental health examination if the court believes such an examination would be helpful in making its sentencing decision. Rule 26.5, Arizona Rules of Criminal Procedure, provides:

Rule 26.5. Diagnostic evaluation and mental health examination

At any time before sentence is pronounced, the court may order the defendant to undergo mental health examination or diagnostic evaluation. Reports under this section shall be due at the same time as the pre-sentence report unless the court orders otherwise.

The Comment to Rule 26.5 states, "If the need for mental health examination or evaluation is not revealed until after the pre-sentence report is prepared, or if the need for additional testing or examination becomes apparent at a prehearing conference, the court may delay sentencing for up to an aggregate of 70 days after the determination of guilt."

The trial court has discretion in choosing whether to order a presentence evaluation. In *State v. Williams*, 183 Ariz. 368, 381, 904 P.2d 437, 450 (1995), the Arizona Supreme Court held that when any evidence of mental problems exists, the court should ordinarily exercise its discretion in favor of granting an examination:

Generally speaking, when a defendant seeks a mental health examination to explore possible mitigating circumstances, the trial court should exercise its discretion in favor of an examination when it finds that it needs more information to determine whether a mitigating factor might exist. *State v. Clabourne*, 142 Ariz. 335, 347, 690 P.2d 54, 66 (1984); see also A.R.S. ' 13-4013 (1989) (granting indigent defendants in capital cases the right to such experts as are reasonably necessary). However, the rule is discretionary, and we will find an abuse of discretion only if the denial or restriction of funds is shown to have caused substantial prejudice to the defendant. See *Clabourne*,

142 Ariz. at 342, 690 P.2d at 61.

When a defendant requests an examination under Rule 26.5, Ariz. R. Crim. P., the psychologist-patient privilege does not exist. *State v. Ortiz*, 144 Ariz. 582, 584, 698 P.2d 1301, 1303 (App. 1985).